

GTW ASSOCIATES



April 27, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Coalition United to Terminate Financial Abuses for Television Transmission's (CUTT FATT) Petition For Rulemaking and Request For Declaratory Ruling (MB Docket No. 09-23)

Dear Secretary:

GTW Associates is an International Standards and Trade Policy Consultancy.

GTW requests the FCC to consider relevant language in the notice and comment rule making process in the *"Matter of Advanced Television Systems and Their impact upon the Existing Television Broadcast Service MM Docket 87-268"* in their consideration of the Coalition United to Terminate Financial Abuses for Television Transmission's (CUT FATT) Petition For Rulemaking and Request For Declaratory Ruling (MB Docket No. 09-23). GTW urges the Commission to consider how the previous rulemaking documentation related to patents in the applicable rule making procedure apply or do not apply to the Petition and whether there is need to clarify the applicability of the 1961 era Revised Patent Procedures of the Federal Communications Commission 3 F.C.C. 2d referenced in *Docket 87-268* and what is the status of such "Procedures" compared to mandatory rules and regulations.

In the first report and order [\(Attachment One\)](#) First FCC NPRM November 8, 1991 section VII paragraph 46 pages 23 and 24 FCC states that: "we expect that any proponent of an ATV system selected as the nationwide standard will adopt a reasonable patent structure and royalty charging policy so that sufficient numbers of manufacturers will be able to produce ATV receivers and meet consumer demand."

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In footnote 84 of the first report and order there is reference to Revised Patent Procedures of the Federal Communications Commission 3 F.C.C.

2d [\(Attachment Two\)](#) This procedure document contains text, *“Whenever it appears that the patent structure is or may be such as to indicate obstruction of the service to be provided under the technical standards promulgated by the Commission, this fact will be brought to the Commission's attention for early consideration and appropriate action.”* Footnote 84 also refers to the *matter of Amendment of part 3 of the Commissions Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, 21 RR 1605, 1615, 1961 and *En Banc Letter from the FCC to Multiplex Development Corp* reprinted 21 RR 1616a (July 26, 1961). GTW urges the commission to clarify what changes in the Revised Patent Procedures of the Federal Communications Commission have occurred in 3 FCC 2d since its creation in 1961 and since its reference in the NPRM notice of 1991. GTW urges the commission to clarify what role and impact have “Procedures” compared to formal rules and regulations. Finally GTW urges the commission to contemplate if it envisions undertaking dispute resolution between parties disagreeing whether or not the Revised Patent Procedures of the Federal Communications Commission 3 F.C.C. 2d are followed. The references in the footnote 84 to the *Amendment of part 3 of the Commissions Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, 21 RR 1605, 1615, 1961 and *En Banc Letter from the FCC to Multiplex Development Corp* describe situations where FCC performed such resolution of disputes.

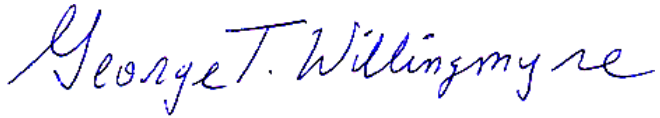
[Attachment Three](#) Second FCC R & O and Second FCC NPRM April 4 1992 Section VI paragraph 68 pages 44 & 45 asks if there is need for further regulation beyond the American National Standards Institute patent policy to ensure that reasonable patent licensing policies are indeed adopted.

[Attachment Four](#) Third R & O and Third NPRM September 17, 1992 Section VIII paragraph 78 pages 58 & 59 contains key reference to ANSI patent policy and that greater regulatory involvement is not required but that FCC will remain responsive to any complications or abuses that may arise.

[Attachment Five](#) Fourth FCC R & O December 1996 Section VI paragraph 54 page 24 concludes patents will not be an impediment, but that: “if a future problem is brought to our attention we will consider it and take appropriate action.”

What is the meaning of the statements in the Third Report and order that *"FCC will remain responsive to any complications or abuses that may arise."* And in the Fourth Report and order that *"if a future problem is brought to our attention we will consider it and take appropriate action."*

Sincerely,

A handwritten signature in blue ink that reads "George T. Willingmyre". The signature is written in a cursive, flowing style.

George T. Willingmyre, P.E.

CC

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Attachment One First FCC NPRM November 8, 1991

See section VII paragraph 46 pages 23 and 24 that proponents of a system will adopt a reasonable patent structure and royalty charging policy

A. Patent Licensing

46. In light of the significance we ascribe to consumer acceptance of

ATV technology,⁸³ we believe it appropriate at this juncture to address the issue of patent licensing, a question we believe is important to achieving high levels of receiver penetration. We expect that any proponent of an ATV transmission system selected as the nationwide standard will adopt a reasonable patent structure and royalty charging policy so that sufficient numbers of manufacturers will be able to produce ATV receivers and meet consumer demand.⁸⁴ In particular, we believe that any winning system, and its component parts as appropriate, may have to be licensed to other manufacturing companies in order to generate the supply volumes necessary for the service to develop. We seek comment on these patent licensing issues, and on the extent to which a proponent's patent licensing practices should be considered during the selection of an ATV transmission system.

⁸³ See supra Section V.B.

⁸⁴ Cf. Public Notice, Revised Patent Procedures of the Federal Communications Commission, 3 FCC 2d 26 (1961). See also Amendment of Part 3 of the Commission's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis, 21 RR 1605, 1615 (1961); En Banc Letter from the FCC to Multiplex Development Corp., reprinted 21 RR 1616a (July 26, 1961). We also observe that the Advisory Committee ATV Test Procedures Test Management Plan, Section 2.1 addresses this matter and references the Patent Policy of the American National Standards Institute in connection therewith.

Attachment Two Revised Patent Procedures of the Federal Communications Commission

3 F.C.C. 2d

Excerpted from pages 26 and 27 and 28

Scanned Original Text 3 F.C.C. 2d at
<http://www.gtwassociates.com/answers/fccpatpol.pdf>

Federal Communications Commissions Reports

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C., 20554 December 1961

PUBLIC Notice

Revised Patent Procedures of the Federal Communications Commission

The Federal Communications Commission announces that it is strengthening its patent procedures to assure that the availability of broadcast equipment and radio apparatus meeting performance standards established by the Commission's rules and regulations will not be prejudiced by unreasonable royalty or licensing policies of patent holders. Essentially, the new procedure, which supplements existing patent procedures of long standing, provides for enlarging the staffing order that the Commission may keep currently abreast of all patents issued and technical developments, in the Communications field which may have an impact on technical standards approved by the Commission in the various services.

Under the Communications Act of 1934, as amended (47 U. S. C. 303 (g)), the Commission is charged with the responsibility to "study" new uses for radio, provide for experimental uses of frequencies, and generally encourage; the larger and more, effective use of radio in the public interest. In this connection the Commission promulgates technical standards; for broadcasting and other radio communication services to establish requirements which its licensees must meet in order to provide the kind and quality of service desired. Such requirements may frequently be met only by the use of patented equipment. Therefore, in promulgating these technical standards and regulations, the Commission necessarily gives consideration to the effect of patent rights upon the availability of equipment that will meet the specified performance standards.

In order to determine how these rights are exercised, information relating to licensing and royalty agreements is essential.

The Commission's patent policy for a number of years has been to obtain patent information whenever it becomes relevant to a particular proceeding. For example, the Commission utilized this method of obtaining patent information from system proponents in recent rule-making proceedings to establish standards to permit FM broadcast stations to transmit stereophonic programs on a multiplex basis (docket 13506). In addition, the Commission has required the principal common carriers, such as American Telephone & Telegraph Co., International Telephone & Telegraph Co., Radio Corp. of America, and Western Union to file semiannual patent reports. These procedures will continue to be utilized.

In view of the rapid technological advances in the communications field, the Commission has determined to augment its staff in order to permit, a regularized, continuing, and current study of new technical developments relevant to its jurisdiction. Patent Office publications and records and technical journals will be studied and information of interest will be compiled in the Commission's files. Copies of relevant patents as issued will be secured. The Commission's staff will ascertain the assignment or licensing arrangements for significant patents either by examination of the Patent Office records or by direct inquiry to the patentee, licensees, or assignees.

Whenever it appears that the patent structure is or may be such as to indicate obstruction of the service to be provided under the technical standards promulgated by the Commission, this fact will be brought to the Commission's attention for early consideration and appropriate action.

Through these revised and strengthened procedures, the Commission believes that it will be able to secure the information necessary to protect fully the public interest in this all-important area.

on line at <http://www.gtwassociates.com/answers/fccipr.htm>

Attachment Three Second FCC R & O and Second FCC NPRM April 4 1992

Section VI paragraph 68 pages 44 & 45 asks if there is need for further regulation beyond the American National Standards Institute patent policy to ensure that reasonable patent licensing policies are indeed adopted.

VI. PATENT LICENSING AND RELATED ISSUES

68. The Notice stated our belief that, in order to generate the volume of equipment necessary for ATV service to develop widely, the patents on any winning ATV system would have to be licensed to other manufacturing companies on reasonable terms.¹⁹⁰ The consensus among the commenters is that the winning proponent should adopt such reasonable patent licensing policies.¹⁹¹ There is, however, some divergence of opinion as to the degree to which regulation is required, either now or at some future point, to ensure that reasonable patent licensing policies are indeed adopted. The ATV testing procedures already require proponents to submit, prior to testing, a statement that any relevant patents they own would be made available either free of charge or on reasonable, nondiscriminatory terms.¹⁹² Contrary to the views of

¹⁹⁰ The technology, intellectual property, communications and competition policy questions generated by patent licensing and related issues in the context of selection of an ATV standard have been brought to the attention of other expert agencies, including the Department of Justice, and the Department of Commerce. Letter to Thomas J. Sugrue, Esq., Acting Assistant Secretary for Communications and Information, United States Department of Commerce, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992); Letter to Nancy H. Mason, Deputy Undersecretary, Technology Administration, United States Department of Commerce, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992); Letter to Constance L. Robinson, Esq., Chief Communications and Finance Section, Antitrust Division, United States Department of Justice, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992).

¹⁹¹ EIA/CEG Comments at iv; Blonder Comments at 2; FIT Comments at 1, 5; Philips Comments at iv.

¹⁹² The Advisory Committee ATV Test Procedures Test Management Plan at § 2.1 requires that proponents follow American National Standards Institute (ANSI) patent policies in certifying to the availability of relevant patents they hold. ANSI requires assurance that:

- (1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard or
- (2) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

ATV Test Procedures Test Management Plan, Appendix A, § D.2 (Sept. 25, 1990,

those advocating greater regulatory involvement,¹⁹³ we find that these requirements adequately safeguard the consumer and competitive interests in reasonable availability of relevant patents, so far as is currently possible.

69. One party suggests that there will be powerful marketplace incentives which will induce a winning proponent to adopt reasonable patent procedures.¹⁹⁴ Although this may well prove true, this issue is critical to ATV implementation and to the consumer and competitive interests implicated. When we officially select an ATV system, therefore, we will condition that selection on the proponent's commitment to reasonable and nondiscriminatory licensing of relevant patents. Nonetheless, we find it premature to decide now, as some commenters advocate, whether we can or should exercise greater regulatory control over a selected system's patent practices.¹⁹⁵ Finally, we recognize that prompt disclosure of a winning system's technical specifications may be necessary to permit the mass production of ATV equipment in a timely fashion. The Advisory Committee indicates that industry efforts are underway to designate a standards-setting group to undertake the formulation of such specifications.¹⁹⁶ We encourage such efforts and will monitor the progress of this industry activity.

Rev.).

193 Blonder Comments at 2; FIT Comments at 5-6.

194 EIA/CEG Comments at 13-14.

195 Compare Blonder Comments at 2 and FIT Comments at 5-6 (supporting Commission involvement in patent issues) with Philips Comments at 15 (raising the question of the Commission's authority to address complex patent issues). See also Zenith Comments at 15 (alternatively advocating regulation of patent licensing that would favor firms using domestically-made ATV components). Cf. Blonder Comments at 3 (advocating definition of "American manufactured" for purposes of determining import duties on ATV products only if United States content is over 75%).

Some parties suggest that third party patent rights may complicate patent licensing issues. Although we decline to address the question in the absence of a particular factual context, we observe that to the extent a winning proponent has obtained sub-licensing rights from a third party, we would expect such sub-licensing also to occur on reasonable, non-discriminatory terms. See generally EIA/CEG Comments at 13; EIA/ATV Committee Reply Comments at 12; Philips Comments at 14,15.

196 Fifth Interim Report at 21.

Attachment Four Third R & O and Third NPRM September 17, 1992

Section VIII paragraph 78 pages 58 & 59 contains reference to ANSI patent policy that greater regulatory involvement is not required but that FCC will remain responsive to any complications or abuses that may arise.

VIII. PATENT LICENSING AND RELATED ISSUES: REPORT AND ORDER

78. We have previously stated that in order for ATV implementation to be fully realized, the patents on any winning ATV system would have to be

licensed to other manufacturing companies on reasonable terms.²⁹² The ATV testing procedures already require proponents to submit, prior to testing, a statement that any relevant patents they own would be made available either free of charge or on reasonable, nondiscriminatory terms.²⁹³ Contrary to the views of some,²⁹⁴ we continue to believe that this requirement adequately safeguards the consumer and competitive interests in reasonable availability of relevant patents, and thus, that greater regulatory involvement is not necessary at this time.²⁹⁵ We nevertheless appreciate the importance of this issue, and will, as EIA/ATV Committee suggests, remain responsive to any complications or abuses that may arise.²⁹⁶ We also reiterate that we will condition the selection of an ATV system on the proponent's commitment to reasonable and nondiscriminatory licensing of relevant patents.²⁹⁷

79. The Second Report/Further Notice recognized the importance of prompt disclosure of a winning system's technical specifications to the mass production of ATV professional and consumer equipment in a timely fashion.²⁹⁸ EIA/ATV Committee asserts that incomplete or unavailable documentation would result in major delays in ATV implementation. According to ATSC, immediately after the Advisory Committee recommends a system, ATSC will document the ATV

²⁹² Notice, 6 FCC Rcd at 7034; Second Report/Further Notice, 7 FCC Rcd at 3358.

²⁹³ Proponents are required to follow the American National Standards Institute (ANSI) patent policies in certifying as to the availability of relevant patents they hold. ANSI requires assurance that:

- (1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard, or
- (2) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

ATV Test Procedures Test Management Plan, Appendix A, § D.2 (Rev. Sept. 25, 1990).

²⁹⁴ Grass Valley Comments at 5-6.

²⁹⁵ Second Report/Further Notice, 7 FCC Rcd at 3358. See also AT&T Comments at 6.

²⁹⁶ EIA/ATV Committee Comments at iii, 11-12.

²⁹⁷ Second Report/Further Notice, 7 FCC Rcd at 3358.

²⁹⁸ Second Report/Further Notice, 7 FCC Rcd at 3358. See also EIA/ATV Committee Comments at iii, 12.

Attachment Five Fourth FCC R & O December 1996

Section VI paragraph 54 page 24 concludes patents will not be an impediment, but that: "if a future problem is brought to our attention we will consider it and take appropriate action."

VI. Licensing Technology

54. In earlier phases of this proceeding we indicated that, in order for DTV to be successfully implemented, the patents on the technology would have to be licensed to other manufacturing companies on reasonable and nondiscriminatory terms.¹¹⁰ We noted that the system proponents that participated in the Advisory Committee's competitive testing process were required to submit a statement that they would comply with the ANSI patent policies. The proponents agreed to make any relevant patents that they owned available either free of charge or on a reasonable, nondiscriminatory basis and we stated that we intended to condition selection of a DTV system on such commitments.¹¹¹ In the Fifth Further Notice, we sought additional comment on whether more detailed information on the specific terms of such patent licensing, how pending patents will be licensed, or any other intellectual property issues should be considered.¹¹²

55. It appears that licensing of the patents for DTV technology will not be an impediment to the development and deployment of DTV products for broadcasters and consumers. We reiterate that adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents, but believe that greater regulatory involvement is not necessary at this time. We remain committed to this principle and if a future problem is brought to our attention, we will consider it and take appropriate action.

VII. Closed Captioning

56. In the Fifth Further Notice, we noted that the requirement contained in Section 305 of the Telecommunications Act of 1996¹¹³ for the Commission to assure that video programming is fully accessible through the provision of closed captions is being examined in MM Docket No. 95-176.¹¹⁴ We also noted that the ATSC DTV Standard reserves a fixed 9600 bits per second data rate for closed captioning and that we understood an EIA subcommittee was considering the syntax for the data and how to include closed captioning information for multichannel SDTV transmissions. We sought additional comments concerning the ability of DTV to include

¹¹⁰ Notice, *supra* at 7035; Second Report/Further Notice, *supra* at 3358; and Third Report/Further Notice, *supra* at 6982.

¹¹¹ Third Report/Further Notice, *supra* at 6983.

¹¹² Fifth Further Notice, *supra* at 6261.

¹¹³ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹¹⁴ Notice of Inquiry in MM Docket No. 95-176, 11 FCC Rcd 4912 (1995) and Order in MM Docket No. 95-176, 11 FCC Rcd 5783 (1996).